T. A. Byrne Chevrolet, Inc. *and* John Myrick. Case 2–CA–23439

May 31, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On December 19, 1989, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief. On July 11, 1990, the Board remanded the case to the judge to make additional findings of fact. On July 31, 1990, the judge issued the attached additional findings of fact. The Respondent filed supplemental exceptions to the additional findings and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

The Respondent is an automobile dealership employing union-represented mechanics. The collective-bargaining agreement incorporates an incentive program by reference. Under the incentive program, the mechanics generally are paid more for work which is paid for by the customers (CPL work) than for work done under warranty. On the morning of October 7, 1988, Charging Party John Myrick was assigned an ambulance-van to repair. Myrick credibly testified that when he asked his supervisor, Tom Kenna, if he would be paid CPL time or warranty time for the job, Kenna replied that Myrick would be paid warranty time.[2] Myrick testified that, subsequent to his conversation with Kenna and while he was at lunch, he called General Motors Warranty Information and also General Motors Zone Office to inquire whether the repair work was warranty work.

The judge found that Myrick's calls to General Motors were in furtherance of an attempt to enforce specific provisions of the collective-bargaining agreement and therefore constituted protected concerted activity. The judge further found that the Respondent discharged Myrick because of his calls to General Motors and thus that the discharge violated Section 8(a)(1) of the Act. We agree.

To be protected activity, Myrick's telephone calls to General Motors had to relate to an ongoing labor dispute. See *Emarco, Inc*., 284 NLRB 832 (1987). Here, the Respondent, through Kenna, informed Myrick, after Myrick had asked whether he would receive CPL or warranty pay, that Myrick would receive warranty pay for the ambulance repair job. At that juncture, there was a legitimate question over what rate Myrick should be paid under the contract's incentive program, and Myrick's efforts were directed thereafter toward enforcing a contract right—i.e., the right to be paid at a CPL rate for CPL work. Thus, at least at that point, a labor dispute had arisen. Myrick's telephone calls were taken in furtherance of his position in that dispute and thus constituted concerted activity as defined in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). Accordingly, we agree with the judge that, as Myrick was discharged for engaging in this protected concerted activity, the discharge violated Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, T. A. Byrne Chevrolet, Inc., Mt. Kisco, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

James M. Mills, Esq., for the General Counsel
Perry S. Heidecker, Esq. and *Robert F. Milman Esq. (Marshall M. Miller Associates, Inc.)*, for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in New York City on October 2 and 3, 1989. The charge was filed on February 13, 1989, and the complaint was issued on March 30, 1989. In substance, the complaint alleges that the Respondent discharged John Myrick because he called General Motors regarding matters relating to pay rates.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Under the circumstances of this case ''the clear preponderance of all the relevant evidence'' is insufficient to establish that the credibility resolutions of the judge are incorrect. We recognize, as the Respondent points out, that there is evidence in the record that calls into question the credibility of Charging Party John Myrick. On the other hand, Supervisor Tom Kenna's trial testimony, which the Respondent would have the Board credit, conflicted on key points with his earlier statements in his sworn affidavit. We also note that the judge relied on the demeanor of the witnesses. Thus, we will not overrule the judge's crediting of Myrick where the testimony of Myrick and Kenna conflict.

[2] Kenna, on the other hand, testified that he had told Myrick on the morning of October 7 that it was too soon to determine if the work was CPL work or warranty work. The judge credited Myrick rather than Kenna on this point and, as noted, we find no reason to disturb the judge's credibility resolutions.

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

The Respondent operates an automobile dealership in Mt. Kisco, New York, where it sells new and used vehicles. As part of its operation it employs a crew of mechanics who, at the time of these events, were supervised by Tom Kenna, the service manager.

The auto technicians employed by the Company are represented for collective-bargaining purposes by Automobile Lodge 447, International Association of Machinists and Aerospace Workers. The most recent contract between the Union and the Company runs from June 1, 1988, to June 1, 1991. The Union's shop steward is Robert Martorano.

John Myrick was hired by the Company in May 1986 after having been discharged by two previous employers. He was hired as an ''AA'' mechanic, which under the collective-bargaining agreement is the highest mechanic classification. The contractual job description is as follows:

> *''AA''Mechanics*—Must be able to perform all phases of mechanical repair work from bumper-bumper in factory book time, and be capable of being a team leader if required.

Pursuant to the collective-bargaining agreement, the mechanics are guaranteed a minimum of pay based on 35 hours per week assuming that they work 5 full days. In addition there is an incentive program incorporated by reference in the collective-bargaining agreement (at appendix A).

The incentive system which appears to be widespread in the industry works as follows: Service department work is generally divided into three categories. First, there is warranty work which is work done under General Motors warranty and which is paid for by General Motors. Second, there is customer paid work (CPL), which is work paid for by the customer because the vehicle or a part thereof, is no longer under warranty. Third, is internal work which is paid for by the dealership. A common example of internal work would be a comeback situation where the mechanic did not do a proper fix in the first place.

When work done by a mechanic is warranty work the mechanic gets paid his hourly wage rate times the number of hours allowed for the job by the General Motors Manual (GM manual). That is, if the replacement of a spark plug is defined as requiring 10 minutes by the GM manual, the mechanic will get paid his hourly wage rate times 1/6th hour irrespective of how long he actually takes to do the work. On the other hand, when customer paid work is done, the mechanic will be paid his hourly wage rate multiplied by the time allowed under the Chilton Manual. The difference is that although the Chilton Manual describes every mechanical operation in much the same manner as the GM manual, the Chilton Manual, as a general rule allows more time for the same operations as the GM manual. Accordingly, as a mechanic will be paid for a CPL job in accordance with the Chilton Manual, the chances are that he will earn more money for the same type of work than if the job was under warranty. In both cases, a good mechanic who can work fast, will ''beat the book'' and earn more money than the mechanic who only can meet the book.[1]

Myrick's employment history with the Respondent was not a happy one. Nevertheless, because of a short supply of mechanics and because he was a hard worker, he was retained by the Company despite his many shortcomings.

One of Myrick's chronic problems throughout his employment was ''come-backs'' which, as noted above, are situations where the unhappy customer brings back his car after it allegedly has been fixed.

In September 1988 Myrick was involved in a scheme where he attempted to turn in old horns from a used car claiming that they were the horns from a new automobile that he had recently purchased. This was, in effect, an attempt to defraud General Motors by making a false warranty claim. Kenna told Myrick that he was trying to get himself fired.

Also in September 1988 Myrick sold an old car to another employee for a fixed price but also on condition that he would repair the engine if she paid for the parts. When he discovered that the problem was more extensive than he thought, Myrick wanted to fix the engine in a superficial way so he could palm off a defective car on the buyer. When the other employee wanted her money back, Myrick delayed and a serious dispute erupted in the shop between the two employees. When Kenna told Myrick that he should return the money, Myrick responded that Kenna should mind his own business and he filed a grievance claiming that Kenna was interfering. (The Union did not pursue the grievance.)

The events that precipitated Myrick's discharge all occurred on Friday, October 7, 1988. On that morning, dispatcher Zeitler assigned Myrick the job of repairing an ambulance van which had a diesel engine that although bought from the Respondent had been installed by someone else. Myrick was told that the engine had a knock and his job was to diagnose the problem and make the repairs.

According to Myrick he proceeded with the job, first by letting the engine run for about 30 minutes so that he could diagnose where the knock was located after the engine was warmed up. He states that he then took steps to remove the engine by removing the bumper, the grille, the headlights, and other bits of machinery.

At this point, according to Myrick he went to lunch with another employee and discussed whether the job he was doing was warranty work or customer paid work. The issue here was whether the engine was covered by the General Motors warranty because although purchased new at Respondent, it had been installed by someone else. Myrick states that after lunch he called a branch office of General Motors, described his situation, and asked for an opinion as to whether the job he was doing was warranty work. Myrick was told, however, that this was something that was between him, the dealership, and the union.

When Myrick returned from lunch he first went into the dispatch office where he attempted to look in the warranty manual (which is on microfiche), to find out how many

[1] Although not particularly relevant, it is noted that in certain circumstances (for example where a job is particularly difficult) the service manager may authorize additional time to perform the work over and above the time allowed by either manual.

hours were allowed for the work he was doing. When Kenna found him in the office, he asked Myrick if he had called the General Motors branch office. According to Myrick, he at first denied making such a call but admitted it after being pressed. Myrick states that when he did admit making the call, Kenna told him that he was fired.

According to Myrick there then ensued a conversation in Kenna's office that was attended by Zietler and Robert Martorano, the shop steward. At this time, according to Myrick, Kenna repeated his discharge decision and told Martorano that Myrick had called the branch office.

The Respondent asserts that when the van was initially assigned to Myrick the exact nature of the problem was not known. It concedes that it therefore would not have been possible at this stage to determine whether the work would be CPL work or warranty work. This is because if the problem emanated from the engine itself it would be warranty work, but if the problem arose because of the way the engine was installed it would be CPL work.

In any event, Zietler testified that when he first assigned the job, Myrick said that he did not want to do this job. Zietler states that he reported this to Kenna who said that he would take care of the situation. According to Kenna, he spoke to Myrick and ordered him to proceed with the job by first taking off the oil pan in order to diagnose the problem. Kenna states that at this point, Myrick stated his opinion that it was a CPL job. He states that he told Myrick that until the problem was diagnosed, it was too early to tell whether the work was CPL work or warranty work.

According to Kenna, Myrick said that he wanted to take the engine out rather than pull down the oil pan. Kenna states that Myrick said, ''Pretend I pulled the pan out and we'll just [go] ahead a pull the engine out.'' The import of this, according to Kenna, is that Myrick wanted to skip the procedure of pulling down the oil pan, which is necessary in order to properly diagnose where the knock was coming from, and go directly to the next step which might entail removing the engine if the first step indicated that this would be appropriate. Thus, according to Kenna, what Myrick was proposing was to skip an essential procedure required by the General Motors manual and get paid for it.

Kenna testified that he noticed Myrick in the office at 10:30 or 11 a.m. looking in the Chilton Manual. He states that when he asked him what he was doing, Myrick stated that he wanted to see how many hours were allowed for the job under this manual. Kenna states that he told Myrick to get back to work.

According to Kenna at about 11:45 a.m. as he was distributing paychecks he saw that Myrick was not in his bay and that very little work had been done on the ambulance. He states that he saw that the oil pan had not been pulled down and that the engine grill and bumper were off. According to Kenna, he estimated that although the job had been assigned to Myrick 3 hours before, there was only about 30 minutes worth of work done so far. Kenna testified that when he saw this he decided at this point to discharge Myrick.

Kenna conceded that he received a phone call from the General Motors branch office regarding Myrick's phone call to them. He also acknowledged that he was upset by the call as it made the Company look foolish. It is also clear to me that the very first thing Kenna did when he saw Myrick after lunch was to confront him about the phone call to the branch office.

Two key points in Kenna's testimony were that (1) Myrick had refused to obey a direct order by not pulling down the oil pan; and (2) that he (Kenna) made the decision to discharge Myrick before lunch and therefore before Myrick made his phone call to General Motor's branch office. Unfortunately for the Respondent, Kenna made prior statements which were inconsistent with his testimony.

In a pretrial affidavit given by Kenna during the investigation of this case he stated inter alia:

> 21. On or about October 7, there was an incident in which Myrick had done only about thirty minutes of work on an engine in an entire morning. He called Chevrolet to inquire about ho he would get paid for the job—either warranty time or ''Chilton'' time.
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> . . . .
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> 23. *Up to the time the meeting began, I hadn't planned on discharging Myrick. I personally told Myrick*; Bob Martorano, the shop steward; and Tim Zeitler, the shop supervisor, to come to my office. I asked Myrick if he had contacted the branch office. He denied it. I asked him again; he denied it. I told him I knew it was him. He admitted calling and said he did it because he wanted to know why he was getting paid warranty time on a CPL . . . job. I told him it wasn't CPL time, but warranty work. (This was the first time he questioned how he would get paid for the job, but he questioned it to such an extent that he did virtually no work on the job for the entire morning). I told him it wasn't his concern whether it was warranty or CPL work, but the proper procedure would have been for him to do the work first and then discuss the matter of pay rate with me or a shop steward. Martorano then said that I was right, Myrick should have done the job, and if he wasn't paid enough, we could have sat down and discussed it . . . I told him that he's caused too many problems in the last couple of weeks with comebacks and problems where he didn't want to do the jobs for service advisors, trying to get parts from the part department (referring to incident with the horn), and over the past six or seven months I had been bringing him into my office to discuss his work habits. I told him that we just couldn't continue. I dismissed him. Martorano said to Myrick that he wished he would have come to him first instead of going to the branch office. Neither Myrick nor the Union ever claimed that I discharged Myrick because he sought the assistance of the Union. In fact, I was the one who called Martorano to the meeting because I wanted to make sure he heard the entire case. Martorano asked if we could discuss the matter. I refused, saying that Myrick had caused me more problems in the last few months than all the other employees combined. . . . [Emphasis added.]

In a response to a grievance filed by Myrick, Kenna wrote on October 12, 1988:

> On Friday morning John told me there was a noise in the engine. I told him to determine where the noise was coming from. He said the noise was coming from the crankshaft or bearings. *I suggested he either take*

the pan off or pull the engine. A lengthy discussion followed in which John said he should get paid twice for doing this job. John did not want to do this work. *At 9:30 AM. I told John to pull the engine and stop messing around*. At approximately 12:30 PM I got a call from Chevrolet Branch Office . . . stating that one of my technicians had called . . . regarding an ambulance that was in our shop . . . wanting to know if this was covered under warranty. The caller also wanted Chevrolet to guarantee that Tom Kenna would pay him for the job as he did not think this engine was covered under warranty. He also figured that he still should be paid Chilton time for doing this job. Chevrolet Motor Division told me that this was the first time they ever had a call regarding a labor dispute between a technician and a dealer. I asked John if he called the Branch. He denied it . . . I told him I had proof that he called the Branch. It was then he admitted it. I told him to close the Chilton book and come to my office with the Shop Steward and my Shop Supervisor. I explained the whole situation . . . Bob Martorano told John Myrick he had no business calling the Branch. He should have done the job and got paid for the time and then if he was not satisfied with the allotted time, he should have gone to Tom or himself and pleaded his case. I told John and Bob, by calling the Branch, he made TAB look very foolish as we are a union shop and there is no need to get Chevrolet . . . involved in our labor disputes. I dismissed John as I couldn't tolerate this type of insubordination and mistrust. As stated before, I told John to remove engine at 9:30 AM. I dismissed him at 1:00 PM. He had only done about 30 minutes work on the ambulance in that time. . . . [Emphasis added.]

III. ANALYSIS

While Myrick may have had a lot of problems while working at the Respondent, it is clear to me that but for the events of October 7, 1988, he would not have been discharged. Moreover, I am convinced that had it not been for the phone call he made to General Motor's branch office, he would have remained employed. Thus, notwithstanding Kenna's testimony elsewhere, he stated in his pretrial affidavit that he had not decided to discharge Myrick until the meeting that was held after lunch and which was after he had learned of Myrick's telephone call. Further, the whole tenor of his prior statements indicates to me that the principal reason for discharging Myrick was because of the call and not because Myrick had not pulled the oil pan or had done only 30 minutes of work on the ambulance that morning.

An employee, even if acting alone, who attempts to enforce provisions contained in a collective-bargaining agreement is engaged in protected concerted activity. The theory behind this is that even if acting alone in a particular case, an employee's attempt to enforce a union contract is in furtherance of the concerted activity which involved the making of the contract in the first place. See *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); *Interboro Contractors*, 157 NLRB 1295 (1967), enfd. 388 F.2d 495 (2d Cir. 1967).

Because the ambulance had an new engine which had been installed outside the shop, this raised a legitimate question as to whether Myrick's work on the engine was going to be considered warranty work or customer paid work. Because this therefore determined the number of hours that Myrick would be credited with, it therefore directly determined the amount of money he would be paid for the job under the Union contract's incentive plan. Accordingly, it seems to me that Myrick's call to the General Motors branch office during his lunch hour was in relation to and in furtherance of his attempt to enforce specific provisions of the collective-bargaining agreement. As such it is my opinion that he was engaged in protected concerted activity as defined by Section 7 of the Act. Since I have concluded that the Respondent's principal reason for discharging Myrick was because of this protected activity, I shall conclude that it violated Section 8(a)(1) of the Act.

CONCLUSION OF LAW

By discharging John Myrick because he attempted to enforce provisions of the collective-bargaining agreement with the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950). plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, T. A. Byrne Chevrolet, Inc., Mt. Kisco, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting attempting to enforce provisions of the collective-bargaining agreement with Automobile Lodge 447, International Association of Machinists and Aerospace Workers.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer John Myrick immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the unlawful discharge and notify the John Myrick in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Mt. Kisco, New York, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 2 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
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> To bargain collectively through representatives of their own choice
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> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for attempting to enforce provisions of our collective-bargaining agreement with Automobile Lodge 447, International Association of Machinists and Aerospace Workers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer John Myrick immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify John Myrick that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

T. A. BYRNE CHEVROLET, INC.

James M. Mills, Esq., for the General Counsel.
Perry S. Heidecker, Esq. and *Robert F. Milman, Esq. (Marshall M. Miller Associates, Inc.)*, for the Respondent.

ADDITIONAL FINDINGS OF FACT

On July 11, 1990, the Board remanded this case to me with directions to make additional findings of fact. Specifically, I was directed to resolve whether on October 7, 1988, the Respondent's service manager, Tom Kenna, told Charging Party John Myrick that he would be paid for a particular repair job at the warranty rate or at the customer paid work rate (CPL).

John Myrick testified that after receiving the job assignment from Tim Zeitler, he asked Kenna at what rate he was going to be paid for the job. He states that Kenna told him that he was going to be paid at the warranty rate (i.e., at the lower rate), and to shut his mouth.[1] Consistent with this was the testimony of shop steward Robert Martorano, who stated that on the morning of October 7, Myrick complained to him that he was not being paid properly for the job.

Kenna on the other hand testified that when he confronted Myrick after being told by Zietler that Myrick did not want to do the job, Myrick said that it was CPL work, whereupon he told Myrick that the determination as to whether it was a warranty or CPL job could not be made until after a proper diagnosis of the problem was made. Thus, according to Kenna he did not tell Myrick that the work was to be done at the warranty rate because he did not know at that time what rate was applicable.

Based on the record as a whole including demeanor considerations, I credit Myrick. Firstly, his assertion that he was told by Kenna that it was to be a warranty job is consistent with the testimony of the shop steward and is consistent with the grievance Myrick filed on the some date. Secondly, there is no dispute as to the fact that Myrick called General Motors to find out if such work should be considered warranty work or not. It seems unlikely that Myrick would have called up General Motors to find out the answer to a question unless there was a real dispute to complain about. Thirdly, I have noted in my previous decision, the substantial inconsistencies between Kenna's testimony and his prior inconsistent statements made in relation to Myrick's discharge.

Therefore, having reexamined the record in this matter, I conclude that on the morning of October 7, 1988, Myrick was told by Kenna that he was to be paid according to the warranty rate for the ambulance engine repair job.[2]

[1] In a grievance filed on October 7, 1988, right after his discharge, Myrick stated, inter alia, that Kenna told him that he was going to be paid at the warrant rate.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.